United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL WITH PROOF OF SERVICE

76-1426

To be argued by
PAUL WINDELS, JR.

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

BP/S

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

MICHAEL MEDICO,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF OF DEFENDANT-APPELLANT

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REPLY BRIEF OF DEFENDANT-APPELLANT MICHAEL MEDICO
(who will be referred to herein as "Defendant")

ARGUMENT

In this reply brief, we will merely respond to what appear to us to be errors in the Government's Answering Brief.

POINT I

THE HEARSAY PROBLEM

The hearsay evidence admitted by the Court as part of the Government's direct case purported to identify the getaway car which was subsequently linked to Defendant. In short, it

was not peripheral evidence but evidence connecting Defendant directly with the robbery. In view of the failure of the Government's companion case against a co-defendant based on identification by bank employees, it must be said that this evidence was, in fact, crucial to the conviction of Defendant.

The Government in its brief acknowledges that there is not as yet any judicial authority dealing conclusively with whether or not hearsay or double hearsay which might otherwise fall within 803(24) and 804(b)(5) of the Federal Rules of Evidence is nevertheless barred in a criminal prosecution by the right of a defendant to confrontation as expressed in the Sixth Amendment to the Constitution. The cases cited in Defendant's main brief indicate that hearsay evidence which is an essential part of the prosecution's case in chief should be barred by virtue of this constitutional right to confrontation. United States v. Yates, 524 F.2d 1282, 1285-86 (D.C. Cir. 1975). The Government cites two cases neither of which are of any real assistance. Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038 (1973), dealt with hearsay offered by a defendant as part of his defense. In addition, the hearsay there constituted a serious admission against the interest of the declarant so that the statement was, of its nature, particularly reliable. Obviously this case can have no weight here where the hearsay has been admitted as a crucial part of the prosecution's case against Defendant and there is no particular support for its reliability. In fact it is demonstrably inaccurate.

The Government's other citation, Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210 (1970), involved a statement made by a co-conspirator during the concealment phase of the conspiracy. The court based its decision upon the conclusion that the evidence itself was only of peripheral significance. Certainly, it likewise can have no weight here where the double hearsay purported to connect Defendant with the getaway car used in the robbery itself.

The Government's brief really does not get to the essence of Defendant's point on hearsay: The Government's double hearsay did not even comply with the basic reliability requirements of 803(24) and 804(b)(5) of the Federal Rules of Evidence, and it seems clear that those rules are not available to the prosecution in this case in the crucial area of linking Defendant with the crime because they would thus abrogate the right to confrontation guaranteed by the Sixth Amendment.

POINT II

THE HIGHLY PREJUDICIAL EVIDENCE OF A TOTALLY UNRELATED DISCHARGE OF FIREARMS OBTAINED AS A RESULT OF A QUESTIONABLE SEARCH

The Government's brief virtually ignores Defendant's principal contention in the matter of the admission of the pellet-riddled pants together with lead fragments and expended shells and testimony concluding that either a shotgun or a .22 caliber pistol had been fired in Defendant's apartment. It understandably seeks to draw the controversy over to the more

shadowy issue of whether or not the consent to search form pursuant to which this evidence was obtained was properly executed, and it gives only passing treatment to Defendant's main point which is total irrelevancy and extreme prejudice.

The only arguments made by the Government on the matter of irrelevancy and prejudice are that there was no objection on this basis at the trial and the evidence was in fact relevant to the crimes charged.

On the matter of whether there was objection, we submit the following excerpts from the record:

Upon denial of his motion to suppress the evidence obtained from the search of Defendant's apartment, Defendant's trial attorney told the Court that the issue of the relevance of the evidence seized remained. He then stated:

> "I think that can be taken up at the trial."

(June 24 Tr. 52).

At trial, four days later, when the prosecutor began to question his witness concerning the pellet-ridden pair of pants seized in Defendant's apartment, Defendant's attorney objected:

> "MR. KELLY : Objection, Judge. May I renew my objection made at a pri[illegible] proceeding?
>
> THE COURT: Overruled."

(Tr. 79).

After questioning his witness about a shotgun shell, a .32-caliber revolver shell, a .22-caliber shell, and a Smith .22-caliber cartridge found in the apartment, the prosecutor

moved the admission into evidence of the shells and the pants. Again Defendant's attorney objected:

> "MR. KELLY: Same objection, Judge.
>
> THE COURT: Overruled."

(Tr. 81).

However, aside from all of this, the position of the Government ignores the provisions of 103(d) of the Federal Rules of Evidence which states:

> "Plain error.- Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."

Clearly this was plain error affecting substantial rights. There is not the slightest connection between whatever apparently had riddled the pants and the crime specified in the indictment. The Government experts said that it may have been caused by a shotgun or a .22 pistol; and, although one Government witness testified that a shotgun was held by one of the robbers, not incidentally Defendant, there is no testimony about any handgun. Nor is a shotgun or a .22 caliber pistol such an unusual personal possession that an inferential link might be drawn. Furthermore, the Government made maximum use of this irrelevant evidence by raising it again and again in its summation:

> ". . . what was found? These shells. The shot through the pants from the box. Can there be really any fact that those are pellet holes, and then again the pellet holes, themselves, that were in the wall?"

(Tr. 117)

The prosecutor then went on to paint a picture of Defendant as a "bad man":

"What is said of this man? I think you can come to your own conclusion, but I would submit to you that it shows clearly that there were weapons inside the apartment. That the weapon was used for test fire inside that apartment, and that Mr. Medico had access to weapons, and that is corroborative evidence, showing the opportunity was there to commit the crime, and showing that the gun used to commit the crime was inside the apartment."

(Tr. 117)

The Government cites the United States v. Robinson, 544 F.2d 611 (2d Cir. 1976), in which there was testimony that the defendant when apprehended had a .38 caliber pistol in his possession. But, in Robinson the conviction was reversed on the grounds that the weapon had not been connected with the crime charged and evidence as to it was highly inflammatory. Federal courts have consistently disallowed "attempts to obtain convictions based on the character, personal traits, or generalized bad acts of the defendant, the so-called 'bad man conviction.'" United States v. Robinson, supra, 544 F.2d at 618.

Respecting the manner in which the consent to search form was obtained: The Government goes into considerable length as to this aspect which is, of course, secondary to the basic question of whether the evidence was admissable at all. We have little to add to our main brief. The consent to search form was obtained for the ostensible purpose of determining whether or not a fugitive from justice was in Defendant's home. It was obtained, according to Defendant's wife, at a time when Government agents were already within the residence in a considerable number and on the assertion that getting a search warrant from the Court would be a mere formality anyway.

CONCLUSION

We submit that the Government's brief was of negligible impact upon Defendant's points, any of which mandate reversal.

Respectfully submitted,

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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ROBERT LA GRASSA, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 67-20 60th RD. MASPETH, N.Y.

That on the 18 day of FEBRUARY, 1977, deponent personally served the within REPLY BRIEF OF DEFENDANT-APPELLANT upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

~~By leaving _____ true copies of same with a duly~~ authorized person at their designated office.

By depositing 2 true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

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Robert La Grassa

Sworn to before me this
18th day of February, 1977

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1977